

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR08-228

ZERONICAL Z. RICE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered DECEMBER 3, 2008

APPEAL FROM THE SALINE
COUNTY CIRCUIT COURT,
[NO. CR-2007-625-2]

HONORABLE GRISHAM A.
PHILLIPS, JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Zeronical Rice appeals his October 5, 2007 conviction by a Saline County jury on a charge of battery in the second degree, for which he was sentenced to ten years in the Arkansas Department of Correction. On appeal, he argues that the circuit court erred in denying his motion for directed verdict and in refusing to instruct the jury on justification and the lesser-included offense of third-degree battery. We affirm.

Appellant was charged with committing the offense of second-degree battery against Corporal Chad Westbrook, a shift supervisor at the Saline County Detention Center, on April 19, 2007. On that date, appellant placed an intercom call from his cell to Corporal Westbrook, asking if he could get out of his cell to take a shower. After a verbal confrontation on the phone, Corporal Westbrook proceeded to cell ten to calm appellant down face to face. When Corporal Westbrook arrived at cell ten, he first attempted to talk

to appellant through the door, but it was too loud for him to hear anything being said. He opened appellant's cell door and asked him, "What's the problem?" Appellant ran up to Corporal Westbrook and began yelling in his face. Corporal Westbrook instructed him to back up three separate times, but appellant kept moving closer to him. Finally, Corporal Westbrook shoved appellant back into the cell, at which time appellant responded by striking Corporal Westbrook in the mouth. The blow caused Corporal Westbrook to fall backward and hit his head on a rail, which caused a small cut on the back of his head. He also injured his finger and cut his lip as a result of the fall.

Josh Rapier, a jailer and witness to the incident, testified at trial and essentially corroborated Corporal Westbrook's testimony. Mike Lovell, a trusty inmate, testified that he was present in the radio room with Corporal Westbrook just before the incident took place. He heard the intercom conversation between appellant and Corporal Westbrook and stated that appellant spoke in a confrontational tone. Lovell also witnessed the incident between the two men and further corroborated Corporal Westbrook's version of the events that transpired at cell ten. Jordon Abels, another jailer, testified that Corporal Westbrook alerted him that there was a situation in the top tier, where cell ten was located. Abels testified that he witnessed the incident take place and that appellant was in an aggressive stance when Corporal Westbrook pushed him. After seeing appellant hit Corporal Westbrook, Abels testified that he went upstairs, tried to pull appellant off of Corporal Westbrook, and administered the tazer to subdue him.

After the State rested its case in chief, appellant's counsel moved for a directed verdict, stating, "At this point, Your Honor, I'd make a motion for a directed verdict based first upon the sufficiency of the evidence, and second on the fact that he actually used incorrect procedure in going down and confronting [appellant] and laying his hands upon him. So, therefore, it would be justification for lack of a better word." The circuit court denied the motion.

Appellant then testified on his own behalf. Appellant explained that, at the time Corporal Westbrook pushed him, he thought Corporal Westbrook intended to cause him harm. He testified that he hit Corporal Westbrook in reaction to the push. At the close of appellant's testimony, his attorney renewed the motion for directed verdict, upon prompting by the circuit court, stating, "Yeah, I renew my motion for directed verdict based upon the fact that it's not substantial evidence to convict him and based on the fact that he was — reflex action and no intent shown." The circuit court again denied the motion.

Appellant's counsel requested an instruction on the lesser-included offense of battery in the third degree based upon a theory that Corporal Westbrook did not do his job properly when he went to cell ten and opened the cell by himself when procedure called for two people to be present. Appellant's counsel claimed that Corporal Westbrook made the incident personal and took it outside the scope of his authority as an employee of a correctional facility. The circuit court denied the request, stating that there was no basis for the instruction, and appellant's counsel proffered the requested instruction on third-degree battery.

The jury returned a guilty verdict after fifteen minutes of deliberation and, after an hour of deliberation in the sentencing phase, recommended a sentence of ten years. The circuit court sentenced appellant accordingly, as evidenced by the judgment and commitment order that was entered on October 5, 2007, and appellant filed a timely notice of appeal on October 23, 2007.

I. Denial of Motion for Directed Verdict

We first consider whether this issue is preserved for appeal. Arkansas Rule of Criminal Procedure 33.1(b) provides that in a jury trial a motion for a directed verdict must be made at the close of all of the evidence. If a motion is made at the conclusion of the State's evidence, then it must be renewed at the close of all of the evidence. Rule 33.1(c) further provides that the failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict. Ark. R. Crim. P. 33.1(c). Appellant moved for a directed verdict at the close of the State's case in chief, and that motion was denied. He properly renewed his motion at the close of the evidence. Accordingly, he made the motions at the proper time; however, the inquiry does not end there.

A directed-verdict motion is a challenge to the sufficiency of the evidence and requires the movant to apprise the trial court of the specific basis on which the motion is made. *Tryon v. State*, 371 Ark. 25, 263 S.W.3d 475 (2007). When a motion for a directed verdict does not identify particular or specific elements of proof that are missing from the State's case, the motion fails to properly apprise the trial court of the asserted error. *See id.* A directed verdict

motion must be a specific motion to apprise the trial court of the particular point raised, since when specific grounds are stated and the absent proof is pinpointed, the trial court can either grant the motion, or, if justice requires, allow the State to reopen its case and supply the missing proof. *Tester v. State*, 342 Ark. 549, 30 S.W.3d 99 (2000). The movant is then bound by the scope and nature of the objections and arguments presented at trial. *Id.* As our supreme court has explained, the preservation of a challenge to the sufficiency of the evidence is dependent on the defendant making the specific challenge to the trial court that he seeks to make on appeal. *E.g., Conner v. State*, 334 Ark. 457, 982 S.W.2d 655 (1998).

Although the State did not raise the issue, we hold that appellant's motion for directed verdict and the renewal thereof were not sufficiently specific to satisfy the requirements of Arkansas Rule of Criminal Procedure 33.1(c). The rule is strictly construed, requiring not only a timely motion, but also a statement specific enough to show how the proof was insufficient so that the State may be allowed an opportunity to reopen its case and present the missing proof. *See Eastin v. State*, 370 Ark. 10, 257 S.W.3d 58 (2007). Appellant made no such motion, but rather stated:

At this point, Your Honor, I'd make a motion for a directed verdict based first on the insufficiency of the evidence, and second on the fact that he actually used incorrect procedure in going down and confronting [appellant], and laying his hands upon him. So therefore, it would be justification for lack of a better word.

Appellant's motion for directed verdict was nothing more than a general statement, and the comment about justification is not an appropriate part of such a motion but rather a matter to be argued as part of the defense's case. Additionally, appellant's renewal of the motion for directed verdict was not raised until prompted by the circuit court and then

counsel simply stated, “Yeah, I renew my motion for directed verdict based upon the fact that it’s not substantial evidence to convict him and based on the fact that he was — reflex action and no intent shown.” Because appellant failed to make a sufficiently specific motion, we hold that this issue is not preserved for our review and affirm on that basis.

II. Refusal of Jury Instructions on Third-Degree Battery and Justification

With regard to our standard of review, we have stated that a party is entitled to a jury instruction when it is a correct statement of the law and when there is some basis in the evidence to support giving the instruction. *Vidos v. State*, 367 Ark. 296, 239 S.W.3d 467 (2006). We will not reverse a circuit court’s decision to give an instruction unless the court abused its discretion. *Id.*

Once an offense is determined to be a lesser-included offense, the circuit court is not obligated to instruct the jury on that offense, unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser-included offense. See Ark. Code Ann. § 5-1-110(c); *Ellis v. State*, 345 Ark. 415, 47 S.W.3d 259 (2001). Where there is no evidence tending to disprove one of the elements of the larger offense, the circuit court is not required to give an instruction on a lesser-included offense. See *Stultz v. State*, 20 Ark. App. 90, 724 S.W.2d 189 (1987).

At the close of the evidence, the State presented a set of agreed upon instructions, with the exception of the applicability of a third-degree battery instruction. The circuit court determined that justification was not a defense in the instant case and that the third-degree

battery instruction was not applicable because of the facts of the case. The instruction on third-degree battery was then proffered by appellant.

Appellant claims that the circuit court erred in determining that the instructions were inapplicable. Corporal Westbrook testified that he understood and was familiar with the procedural and operations manual for the Saline County jail. He also testified that the manual states, “[n]ever argue with detainees.” Additionally, Corporal Westbrook testified that the manual states that officers will never enter any occupied cell in the detention facility unless accompanied by at least one other officer. Finally, Corporal Westbrook acknowledged that a rule of the jail is that the tazer must be administered before physical force is authorized.

Appellant points out that jail protocol is established to protect the safety and well-being of both correctional-facility employees and the inmates. As a jailer, Corporal Westbrook testified that his job was to specifically maintain the order of the jail, supervise the shift, and ensure the safety in the jail. Acting in that capacity, appellant asserts that Corporal Westbrook should have been well versed and compliant with the rules of the jail. He maintains that Corporal Westbrook’s actions toward him, as testified to by the other witnesses for the State, clearly were inconsistent with established procedures.

Citing *Warren v. State*, 88 Ark. 322, 114 S.W. 705 (1908), appellant points out that on a conviction of a higher degree of the offense charged than is warranted by the evidence, the appellate court will affirm the judgment for the lower degree warranted by the evidence and impose a lesser punishment, unless the State elects to take a new trial. Appellant urges that the testimony presented by the State’s witnesses shows that Corporal Westbrook failed to

follow any semblance of proper protocol in the incident. He participated in a confrontational discussion with appellant over the intercom and at the cell. Although he stopped short of entering the cell, Corporal Westbrook acknowledged that he stood at the threshold and shoved appellant back into the cell prior to administering the tazer.

Appellant contends that the confrontation was precipitated and initiated by Corporal Westbrook. He voluntarily elected to leave his post in the control room for the express purpose of confronting appellant face to face. On his way, he told another officer that he had to “take care of a problem.” He consciously approached appellant’s cell and purposely opened the locked cell door. Appellant reiterates that Corporal Westbrook confronted him in the threshold of the cell and then deliberately shoved him into the cell. As such, appellant asserts that the circuit court erred in denying his instruction on third-degree battery. Appellant argues that the circuit court could have found that Corporal Westbrook acted outside the scope of his employment as a correctional officer by initiating the confrontation and by deliberately using physical force upon him without provocation.

Accordingly, appellant maintains that there was a rational basis for the circuit court to instruct the jury as to third-degree battery because the jury may have determined that second-degree battery, pursuant to Arkansas Code Annotated section 5-13-202(a)(4)(A)(i) (Repl. 2006), was inapplicable based upon Corporal Westbrook’s actions. Appellant argues that by denying the instruction, the circuit court deprived him of due process because the jury did not have the option to convict him of a lesser-included offense.

The State reminds us that the jury instruction on second-degree battery presented to the jury, pursuant to Arkansas Code Annotated section 5-13-202(a)(4)(A)(i), explained that the State was required to prove beyond a reasonable doubt that appellant intentionally or knowingly, and without legal justification, caused physical injury to a person he knew to be an employee of a correctional facility acting in the performance of his lawful duties. Conversely, appellant proffered an instruction that would have informed the jury, pursuant to Arkansas Code Annotated section 5-13-203(a)(1) (Repl. 2006), that it could find he committed third-degree battery if, with the purpose of causing physical injury to Corporal Westbrook, he caused physical injury to Corporal Westbrook. In support of the latter instruction, appellant argues that Corporal Westbrook “didn’t do his job properly” by opening the cell without another officer present and making his encounter with appellant “personal.”

The circuit judge refused the third-degree battery instruction, stating:

I don’t think that he all of a sudden becomes not a law-enforcement officer even if he does take it personal. And I just don’t think that’s really a defense in this case. I don’t think that the instruction applies and I think that there’s also law that says that is has to – before I can give a lesser-included it does have to be applicable to the facts. . . And in this particular case, we’ve got a specific statute that addresses a battery on a law-enforcement officer and a third-degree battery I don’t think has any provisions with regard to law-enforcement officers. . . . I don’t think that third degree is going to fit the facts.

In the instant case, appellant was specifically charged with committing a battery upon a correctional officer, and there is no dispute that Corporal Westbrook qualified as such. Appellant has cited no authority that supports his theory that any failure by Corporal Westbrook to comply strictly with the jail manual altered his status as a correctional officer or caused his actions to be outside of the line of duty for purposes of the battery statute.

Moreover, there is no evidence that appellant was aware of the provisions of the jail manual at the time of the incident that would have caused him to believe that Corporal Westbrook was not acting within the line of duty. Appellant is attempting to shift the issue from his own intent to his unsupported belief that Corporal Westbrook acted improperly under the “outdated manual.” The State argues, and we agree, that because there is no evidence tending to disprove that Corporal Westbrook was a correctional officer at the time the incident occurred, the circuit court was not required to instruct on a lesser-included offense that did not specifically apply to correctional officers. Accordingly, the circuit court did not err by refusing to give the proffered instruction.

With regard to appellant’s argument regarding justification, it is undisputed that he failed to proffer an instruction. Accordingly, appellant has failed to preserve the issue for our review. *See Osborne v. State*, 94 Ark. App. 337, 230 S.W.3d 290 (2006).

Affirmed.

VAUGHT and HUNT, JJ., agree.